

FOCUS



WORKERS' COMPENSATION NEWS

**Volume #4
Issue #1
1998**

THE WORKFORCE DRUG AND ALCOHOL TESTING ACT

A QUICK GUIDE FOR EMPLOYERS

*Steven T. Wade and Kimberly Beatty**

Recognizing the adverse impact of substance abuse in the workplace, the 1997 Montana Legislature enacted the "Workforce Drug and Alcohol Testing Act," (39-2-205 through 211, MCA). This Act gives employers the right, under certain circumstances, to require their employees to submit to a drug or alcohol test. Some of the goals of the Act are to:

- > educate employers about the legal health and workplace safety risks attributable to the use of drugs and alcohol;
- > insure employees are not impaired in their ability to perform assigned duties in a safe, productive and healthy manner;
- > prohibit the unlawful use of drugs at the workplace and to prohibit being under the influence of illegal drugs during work hours;
- > prohibit the possession or use of alcohol at the workplace or during work hours; and to
- > encourage employees to seek professional assistance at any time personal problems, including alcohol or drug dependency, adversely affect their ability to perform their assigned duties.

The purpose of a drug testing policy is to insure the employee is fit to work; and to protect other employees and the public from the risk of injury from an impaired employee.

The remainder of this article gives you a brief overview of requirements and responsibilities to keep in mind when developing and implementing a drug and alcohol testing policy.

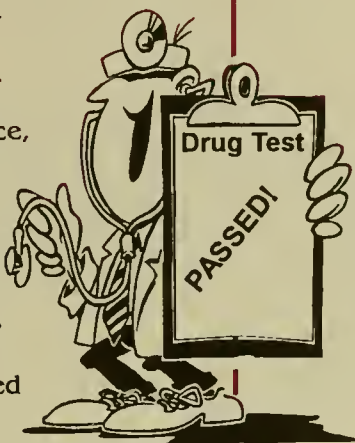
WHO CAN BE TESTED?

Employers may only test employees:

- > in a security position;
- > in a position affecting public safety;
- > in a fiduciary position for you as the employer; or
- > engaged in performing, supervising or managing work in a hazardous work environment.

(The Act defines a hazardous work environment as positions for which drug and alcohol testing is mandated by federal law - including, for example: aviation, commercial motor carrier, railroad, pipeline, and commercial marine employees. It also includes positions that operate, or work in proximity to, construction equipment, industrial machinery or mining activities, or that handle, or work in

Continued on Page 2



INSIDE THIS ISSUE

Dispute Resolution	3
Public Policy Goals	3
WC Annual Report	4
New Mining Law	5
WC/Safety Conference	6
HR Annual Report	6
ABC Clinic Schedule	insert

Editor:

Raini Williams
DLI-ERD
P O Box 8011
Helena, MT 59620
406-444-1574



Workers' Compensation News

Continued from Page 1

proximity to, flammable materials, explosives, toxic chemicals or similar substances. This definition is not exclusive, however, so other non-listed occupations may also apply.)

Employers may not test independent contractors.

TYPES OF TESTING PERMITTED

The Act permits:

- > pre-employment testing,
- > random testing,
- > reasonable suspicion testing,
- > post-accident testing, and
- > follow-up testing.

Pre-employment testing - allows the employer to require a potential employee to pass a drug and/or alcohol test as a condition of employment.

Random testing - allows an employer to randomly test their employees by testing all salaried and wage earning employees on a specified date or by testing randomly selected employees periodically within a calendar year. An employer may use either method, but, if using the random selection method they must use a scientifically valid process, so that all employees, including supervisory or managerial employees, have an equal chance of being tested.

Reasonable suspicion - is allowed if the employer has reason to suspect an employee is impaired on the job because of drug or alcohol use. An employer or supervisor, trained in accordance with federal regulations to detect the signs and symptoms of drug and alcohol use, should make these determinations. Alcohol testing should be done within a short time period, within two hours of the observation, whenever possible.

Follow-up testing - may be permitted for up to one year following a verified positive

test in accordance with the employer's drug and alcohol abuse policy.

Post-accident testing - is allowed if the employer believes the employee's act or failure to act caused a work-related accident that caused a death, a personal injury, or property damage in excess of \$1,500.

Employers must use a qualified testing program which is fully explained to the employees in writing and, if using a random selection method, must get forms from all employees acknowledging receipt of a written description of the testing process. The employer's policy should state the consequences employees may face if they do not consent to testing. The collection, transportation and confirmation of the samples must be performed in accordance with federal regulations.

PAYING FOR THE TEST

The employer must pay for the testing and must pay the employee at their regular rate, including benefits, for the time spent in the testing program. The employer must give the employee a copy of the test. If the results are positive for the presence of drugs or alcohol the employee may request an additional test of the urine split sample by an independent laboratory selected by the employee. If the results of the second test are negative, the employer must pay for the second test. If the results are positive, the employee must pay for the second test.

EMPLOYER RESPONSIBILITIES

Before an employer may test employees for drugs or alcohol they must:

- > have a written policy; and
- > have the policy available for review by all employees for sixty days prior to implementing the policy. (The policy must comply with the U.S. Department of Transportation Drug Testing Regulations).

Continued on Page 7



RESOLVING EMPLOYMENT DISPUTES

John Andrew

The House Joint Resolution 10 (HJR10) work group continues to discuss ways to improve the processes for resolving employment disputes. In its most recent meeting, the HJR10 group continued its review of appellate functions of the Board of Labor Appeals, Human Rights Commission and the Board of Personnel Appeals. One option considered by the group would replace these boards and substitute a hearing officer decision as the final step in the administrative process, with the decision subject to appeal to the district court.

The work group also discussed an option that would end the processes of contested case hearings and judicial review. In this option all administrative processes would have an investigatory stage but rather than continuing to a contested case hearing, mediation would be the mandated, final step in the administrative process. From there the parties would take their cases to the district court. As an alternative to district court, one option envisions substituting an employment court, much like the Workers' Compensation Court, that would hear employment disputes. Appeals from the employment court would be to the Supreme Court.

If you have any questions or thoughts about HJR10 or any of the recommendations or proposals, please call John Svaldi at 444-0066 or John Andrew at 444-4619.

MOVE TO IMPROVE

PUBLIC POLICY GOALS

Keith Messmer

The Workers' Compensation Regulation Advisory Council continues to review and make recommendations regarding the regulatory activities and funding of the Employment Relations Division (ERD). At recent meetings the council focused on public policy goals contained in the Workers' Compensation Act and evaluated the ERD's role in ensuring those goals are met.

The public policy goals being evaluated are: The Workers' Compensation system should

- > provide timely access to wage supplement and medical benefits to workers suffering from a work-related injury or disease,
- > return an injured worker to work as soon as possible after an injury or disease,
- > be primarily self-administering,
- > provide speedy access to benefits, and employers should be able to provide coverage at reasonable constant rates
- > minimize reliance on lawyers and courts to obtain benefits and interpret liabilities, and
- > ensure benefits assist workers at a

reasonable cost to employers, and that those benefits should bear a reasonable relationship to actual wages lost as a result of injury.

For each goal the Council is re-viewing ERD's current responsibilities and discussing whether their role needs to be reduced, re-main at the current level, or be enhanced. Also, whether additional standards be set to assure insurer and employer compliance with the requirements of the WC Act.

If you have input on how the workers' compensation system is doing in meeting these goals, or what the role of the Division should be in carrying out these goals, please let us know. Future meetings of the council are scheduled for April 21 & 22, May 14 and June 2, 1998.

If you would like to be placed on the mailing list for information regarding future meetings, please send your name and address to the:

Employment Relations Division
Department of Labor & Industry
Attn: Keith Messmer
PO Box 8011
Helena, MT 59604 - 8011



Workers' Compensation News

HOT OFF THE PRESS - AVAILABLE NOW!

1997 WORKERS' COMPENSATION ANNUAL REPORT

Marla Yager

You might be asking yourself, "Why would I want a copy of the annual report?" Well, for starters, the Employment Relations Division has been collecting information from insurers, employers, medical providers, claimants, adjusters, rehabilitation providers and from the legal profession - and - it's all compiled and contained in the annual report. The primary use of the annual report is to provide management information to the legislature and to the executive branch to help them make policy and management decisions, but I think you may also find it interesting. You'll likely find something that could or should affect your business. You can call John Weida at 444-4661 to request your copy, you can FAX your request to 406-444-4140 or you can send your request by the Internet at joweida@mt.gov. Let me give you an idea of what you'll find in the report.



were the most commonly injured parts of the body. Employees reported 31,561 accidents in fiscal year 1997. Thirty-five percent of those were in the service industry and construction: manufacturing had the highest rate of injuries. While men make up only 53% of the workforce, they accounted for 62% of all injuries.

Wage loss and medical benefit payments have decreased by \$36 million over the past four years. This 21% decrease represents the effect of cost containment methods, early return to work strategies and legislatively mandated reductions in benefits. Average settlement amounts are also decreasing. The report also contains information on the payments made to attorneys, medical and rehabilitation providers and others in the system.

Payments to the Subsequent Injury Fund (SIF) have decreased from \$350,477 in fiscal year 1996, to \$296,686 in fiscal year 1997. This program assists the vocationally handicapped become employed by offering a financial incentive to employers hiring SIF certified individuals. The program reduces the employer's liability by limiting the amount an employer, or the employer's insurer, has to pay if the workers is injured or reinjured on the job.

The Department issued 7,363 new independent contractor exemptions in fiscal year 1997. Fifty percent were from the construction industry and 23% were from the service industry. The report contains details of the last five years.

Safety Bureau staff conducted 253 inspections of public employers, 109 inspections of private employers, 88 coal mine inspections and 212 metal-nonmetal mining

Continued on Page 5

Wage loss and medical benefit payments have decreased by \$36 million over the past four years.

Obviously, there's information about Montana's workers' compensation system. Did you know there are three different types of insurance coverage? The report has graphs showing

the gross annual payroll and the amount of premiums paid by each type for the past five years.

Of particular importance to employers, the report details facts such as: most injuries take place in the first year of work; the most common types of injuries suffered by employees were strains, sprains or ruptures caused by straining, jumping or lifting; and, the back and upper extremities

Don't Fight It!

Learn About It - at the 1998 Assistance for Business Clinics

Assistance for Business Clinics give you information on employment, safety and tax laws. We tell you how and when to file state and federal forms. The following agencies will provide information:

- ☉ Department of Labor and Industry
 - * Employment Relations Division
 - Wage and Hour
 - Safety Bureau
 - Workers' Compensation
 - Contractors' Registration
 - * Unemployment Insurance Division
- ☉ Internal Revenue Service
- ☉ Montana Department of Revenue



Clinic schedule:

Registration	7:30 to 7:50
Opening Remarks	7:50 to 7:55
Agency Presentations:	8:00 to 12:00
	12:45 to 4:45

Registration fees are set by the local sponsor to cover facility costs, including lunch. **For more information or to register, please contact your local sponsor.** Send your registration form and check to your local sponsor one or two weeks prior to the clinic. Enrollment may be limited. Please respond as soon as possible. *The clinic will be held twice in Missoula. The same program will be offered each day.*

1998 SCHEDULE

Check out the new dates

<u>City</u>	<u>Date</u>	<u>Location</u>	<u>Sponsor</u>		<u>Fee</u>
Livingston	April 16	Yellowstone Motor Inn	Job Service	222-0520	\$25
Havre	April 21	MSU - Northern	Chamber of Commerce	265-4383	\$20
Great Falls	April 22	Holiday Inn	Chamber of Commerce	761-4434	\$30
Libby	April 28	Venture Motor Inn	Chamber of Commerce	293-4167	\$15
Kalispell	April 29	Outlaw Inn	Chamber of Commerce	758-2800	\$25 member
Helena	May 5	Colonial Inn	Chamber of Commerce	447-1941	\$35
Dillon	May 7	Western MT College of the U of M	Chamber of Commerce	683-5511	\$20
Billings	May 12	MSU - Billings	MSU - Billings	657-2203	\$25
Lewistown	May 13	Yogo Park Inn	Chamber of Commerce	538-5436	\$20
					\$30 non-member
Missoula	May 19 or 20	Ruby Reserve Street Inn	Chamber of Commerce	543-6623	\$30
Hamilton	May 21	Exchange	Chamber of Commerce	363-2400	\$20 member
					\$25 non-member
Bozeman	June 2	MSU - Strand Union Building	Chamber of Commerce	586-5421	\$20 member
					\$25 non-member
Butte	June 3	War Bonnet Inn	Chamber of Commerce	723-3177	\$25
Glasgow	June 9	Cottonwood Inn	Chamber of Commerce	228-2222	\$15 member
					\$20 non-member
Sidney	June 10	LaLonde Hotel	Chamber of Commerce	482-1916	\$20
Miles City	June 11	Miles City Community College	Chamber of Commerce	232-2890	\$20

REGISTRATION FORM

NAME OF BUSINESS _____ PHONE NUMBER _____

ADDRESS _____ TOWN/ZIP _____

#ATTENDING _____ DAY _____

NAME (S) OF THOSE ATTENDING: _____

ATTENDING FOR CPE CREDIT (Check here) ☐

SPECIAL ACCOMMODATIONS NEEDED (Check here) ☐

Make your check payable to the appropriate sponsor. Send the check and this form to the sponsor address listed on the back.

Note: Special arrangements are available for persons with disabilities. Inquiries regarding such arrangements should be made to the sponsoring local organization at least 5 working days prior to the workshop.

ASSISTANCE FOR BUSINESS CLINIC SPONSOR ADDRESSES

Billings

Center for Continuing Education
MSU - Billings
CESC - Campus Box 80
1500 N 30th St.
Billings, MT 59101

Bozeman

Chamber of Commerce
P.O. Box B
1205 E. Main
Bozeman, MT 59715

Butte

Chamber of Commerce
2950 Harrison Ave.
Butte, MT 59701

Dillon

Chamber of Commerce
P.O. Box 425
Dillon, MT 59725

Glasgow

Chamber of Commerce
P.O. Box 832
740 Hwy 2 East
Glasgow, MT 59230

Great Falls

Chamber of Commerce
P.O. Box 2127
710 1st Ave. North
Great Falls, MT 59403

Hamilton

Chamber of Commerce
105 East Main
Hamilton, MT 59840

Havre

Chamber of Commerce
P.O. Box 308
518 First St.
Havre, MT 59501

Helena

Chamber of Commerce
225 Cruse Ave Suite A
Helena, MT 59601

Kalispell

Chamber of Commerce
15 Depot Park
Kalispell, MT 59901

Lewistown

Chamber of Commerce
P.O. Box 818
408 E Main
Lewistown, MT 59457

Libby

Chamber of Commerce
Box 704
Libby, MT 59923

Livingston

Job Service Employer Committee
P.O. Box 1199
228 S. Main
Livingston, MT 59047

Miles City

Chamber of Commerce
901 Main
Miles City, MT 59301

Missoula

Chamber of Commerce
P.O. Box 7577
875 E. Front St.
Missoula, MT 59807

Sidney

Chamber of Commerce
909 South Central Ave.
Sidney, MT 59270



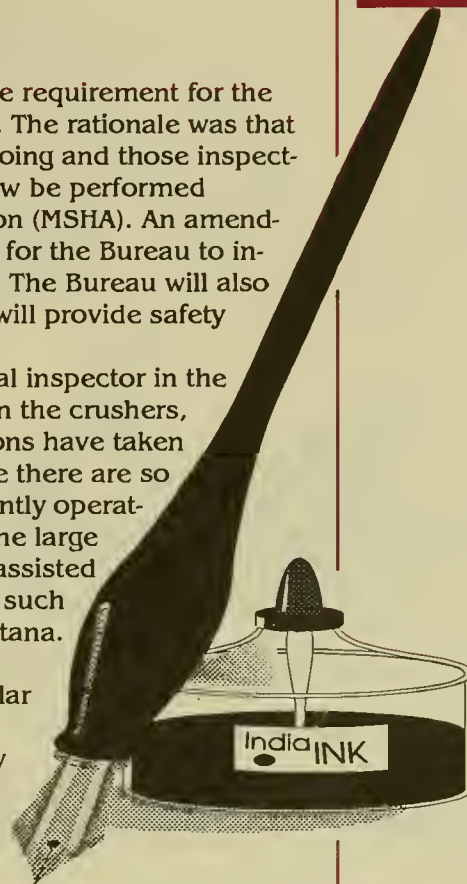


NEW MINING LAW

John Maloney

In the last legislative session Senate Bill 325 eliminated the requirement for the Safety Bureau staff to inspect metal and non-metal mines. The rationale was that there was duplication between what the Safety Bureau was doing and those inspections done by the federal inspectors. The inspections will now be performed solely by the federal Mines Safety and Health Administration (MSHA). An amendment to the bill retained, however, the inspection authority for the Bureau to inspect the sand and gravel operations throughout the state. The Bureau will also continue inspecting coal mines on a quarterly basis and will provide safety training to small miners throughout Montana.

So beginning on July 1, 1998, the metal/non-metal inspector in the Safety Bureau, Joe Donaldson, will concentrate his efforts on the crushers, mills and sand and gravel operations. Actually, these operations have taken the greatest percentage of his time over the years, just because there are so many of them. MSHA lists 213 sand and gravel operations currently operating in Montana. Some operate only seasonally while many, like the large contractors or ready mix plants, operate full time. Donaldson is assisted in these inspections by the coal mine inspectors, who appraise such operations as time permits in the extreme Eastern parts of Montana. Since these types of operations are so mobile and sometimes inconsistent in their operation, most have never been on a regular inspection schedule. Beginning in July, the larger, full time operations will be placed on a consistent schedule so that they will be inspected twice yearly.



Report *continued from page 4*

inspections. The Safety Bureau's increased training is one strategy designed to help employers prevent injuries and to reduce the number of injured workers needing benefits.

Requests for contested case hearings have declined 45% since fiscal year 1993, and the number of petitions filed with the Workers' Compensation Court have dropped 37%, while the Mediation Unit continued to resolve approximately 78% of its' cases. The Occupational Disease Panel took an average of 90 days to complete a case - 20 days less than in fiscal year 1996.

This report is possible because we began collecting data from insurers electroni-

cally through out Electronic Data Interchange (EDI) system. EDI is fast, accurate, reliable and the most cost effective way to send information. Because of this, the Employment Relations Division will propose mandatory EDI reporting by the year 2000 for larger insurers. Many insurers nationwide use EDI routinely. ERD has worked hard to make this service available for Montana's workers' compensation system.

If you have questions about information contained in this article or if you'd like a copy of the 1997 annual report, Contact John Weida at: 406-444-4661 (phone), 406-444-4140 (FAX), or joweida@mt.gov (Internet).



GOVERNOR'S CONFERENCE ON WORKERS' COMPENSATION AND SAFETY

Grab your calendars . . .

. . . and block out September 2-4. The industry event of the year will be occurring in Missoula at the Holiday Inn Parkside. The 1998 Governor's Conference on Workers' Compensation and Occupational Safety is in the works. A committee of Employment Relations Division employees are busily researching topics, lining up speakers, soliciting sponsors and organizing this year's conference.

The 1998 Conference promises to be one of the most informative and educational events for anyone involved in workers' compensation. It is also a great opportunity to meet colleagues and discuss the latest developments within our industry. Look for the registration form and a tentative agenda in the June issue of this newsletter. We look forward to seeing you in Missoula.

Ann Komac

REPORT ON HUMAN RIGHTS BUREAU ACTIVITIES

Jerry Keck

The Human Rights Bureau Annual report summarizes Human Rights Commission decisions and educational activities for fiscal year 1997 (July 1, 1996 - June 30, 1997).

The report also describes the changes enacted by the last legislature which transferred the Commission staff to the Department of Labor and Industry. The most significant changes are summarized and a flow chart reflects the current process for handling claims of unlawful discrimination filed with the Bureau.

Fifty percent of all cases filed in FY97 included an allegation of sex discrimination; 33% alleged discrimination on the basis of disability; 32% alleged age discrimination. (Percentages total more than 100% because some cases allege more than one basis). Approximately 77% of the cases allege employment discrimination; 16% housing discrimination; with smaller numbers alleging discrimination in government services, education and public accommodations.

If you would like to receive a copy of the Human Rights Commission FY97 Annual Report, please contact Rich Semans, Human Rights Bureau, PO Box 1728, Helena MT 59624-1728, or call Rich at (406) 444-3870.



Continued from Page 2

In addition:

- > all positive tests must be certified by a medical review officer trained in this area;
- > the employee must be given the opportunity to provide pertinent medical information to the review officer that would help in interpreting test results. This may include information on currently or recently used prescription or over-the-counter drugs;
- > breath alcohol tests must be administered by a certified breath alcohol technician and they must use testing equipment shown on the federal government's conforming products list. The employee must have an alcohol concentration of greater than .04 before they are considered to have alcohol in their body; and
- > the employee must be given the opportunity to rebut or explain any positive test results. If the employee has a reasonable explanation or medical opinion indicating the results of the original test were not caused by illegal use of drugs or by alcohol consumption, the test results must be removed from the employee's record and destroyed.

EMPLOYER RIGHTS

An employer may require:

- > an employee testing positive to participate in appropriate counseling, treatment or rehabilitation as a condition of continued employment; and
- > as a condition of the program, may require the employee to submit to periodic follow-up testing.

CONFIDENTIALITY

With a few exceptions, the testing results and all other documents obtained by the employer must be kept confidential. They may not be used as evidence or disclosed in any public or

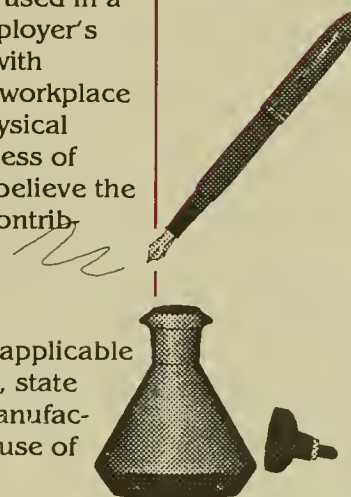
private proceeding unrelated to the drug testing policy, except for the information required by law to be reported to a state or federal licensing authority. However, this confidential information may be used in a legal action arising out of an employer's implementation of the Act, and with respect to inquiries relating to a workplace accident involving a death or physical injury or property damage in excess of \$1,500 when there is reason to believe the employee may have caused or contributed to the accident.

YOUR POLICY

Your policy must describe the applicable legal sanctions under federal, state and local law for the unlawful manufacture, distribution, possession or use of drugs and alcohol.

Your policy must also state:

- > your program for regularly educating or providing information to employees on the health and workplace safety risks associated with the use of drugs and alcohol;
- > your standards of conduct that regulate the use of drugs and alcohol by employees;
- > a description of available employee assistance programs;
- > a description of the sanctions you may impose;
- > the types of drug and alcohol tests to be used;
- > a list of drugs for which you intend to test;
- > a stated alcohol concentration level above which an employee will be sanctioned;
- > a description of your hiring policy with respect to prospective employees who test positive;
- > a detailed description of the procedures that will be followed to conduct the testing program, including how disputes concerning test results will be resolved;



Continued on Page 10



Workers' Compensation News

Continued from Page 7

- > a provision that all information is confidential and that they will not be disclosed to anyone except for the employee, a designated representative of the employee or in connection with a legal or administrative claim arising out of your implementation of the Act or to inquiries relating to workplace accidents as discussed; and,
- > a provision that information obtained through testing unrelated to the use of drugs or alcohol must be held confidential by the medical review officer and may not be released to the employer.

If you are going to develop a drug and alcohol testing policy you are encouraged to contact your attorney for assistance. Other sources to help you develop a policy, review existing policies for compliance with the Act, or to just answer your questions on drug and alcohol testing policies are:

- > Dan McGregor, Legal Bureau, Department of Labor and Industry, at 406-444-3662 or
- > Steven Wade (steview@bkbh.com) or Kim Beatty (kim@bkbh.com) at 406-443-6820.

**Steven Wade and Kim Beatty are attorneys with the law firm of Browning, Kaleczyc, Berry & Hoven, P.C.,*

**DEPARTMENT OF LABOR AND
INDUSTRY
EMPLOYMENT RELATIONS DIVISION
P.O. BOX 8011
HELENA, MT 59624-8011**

**BULK RATE
U.S. POSTAGE
PAID
HELENA, MT
PERMIT NO. 89**

4,250 copies of this public document were published at an estimated cost of 60¢ per copy, for a total cost of \$2,550.00, which includes \$2,100.00 for printing and \$450.00 for distribution.

Montana Department of Labor & Industry - Employment Relations Division